

THE LIQUIDATION SAGA OF JET AIRWAYS – SPEEDY RESOLUTION IS THE KEY

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The Supreme Court's (the "SC") decision ordering the liquidation of Jet Airways (India) Limited ("Jet Airways") under the Insolvency and Bankruptcy Code, 2016 (the "IBC") has finally put an end to the long-drawn battle to revive the airline through the Corporate Insolvency Resolution Process (the "CIRP"). On November 7, 2024, a three-judge bench of the SC allowed an appeal filed by State Bank of India and other creditors against a judgment of the National Company Law Appellate Tribunal (the "NCLAT"), which upheld the National Company Law Tribunal's (the "NCLT") order allowing the successful bidder to continue with the revival of Jet Airways as per the resolution plan and treating the conditions precedent (the "CPs") as fulfilled.

In this update, we highlight certain important points iterated by the SC on the timelines for implementation of resolutions plans and the need for reformation of the IBC.

Facts

Jet Airways' CIRP was initiated on June 20, 2019, by the State Bank of India. The Jalan KalRock Consortium emerged as the successful resolution applicant (the "SRA") to recommence the operations of Jet Airways and submitted a performance bank guarantee ("PBG") of INR1,50,00,00,000 (Indian Rupees One Hundred and Fifty Crores), as required under Regulation 36B(4A) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (the "2016 Regulations"). The approved resolution plan (the "Plan") of the SRA contained certain CPs, which had to be fulfilled by the effective date (i.e., within ninety (90) days from the date on which the Plan was approved by the NCLT with a further permissible extension of one hundred and eighty (180) days (two hundred and seventy (270) days in all). The Plan made it compulsory for the SRA to make the first tranche payment of INR3,50,00,00,000 (Indian Rupees Three Hundred and Fifty Crores) within one hundred and eighty (180) days after the effective date and on completion of the CPs.

Although some CPs had not been completely fulfilled, the SRA filed an application in the NCLT stating that all the CPs had been fulfilled and sought an exclusion of certain time periods for calculation of the date on which the first tranche payment was to be made. The NCLT agreed with the SRA that the CPs of the Plan had been substantially complied with and set May 20, 2022 as the effective date of the Plan.

The NCLT's order was appealed in the NCLAT, where the lender, by an affidavit (the "Lender's Affidavit") agreed to waive the issue of non-fulfillment of all the CPs if the first tranche payment was made by August 31, 2023. In non-compliance, the SRA only made a cash payment of INR2,00,00,00,000 (Indian Rupees Two Hundred Crores) and sought for an adjustment of the balance funds from out of the PBG. The NCLAT affirmed this, causing the lenders to appeal the NCLAT order in the SC.

The SC ruling

The SC judgment, authored by Justice Pardiwala, set aside the NCLAT order and invoked Article 142 of the Indian Constitution directing Jet Airways to be sent into liquidation on the following grounds:

- Question of law: Before analyzing the issues, the SC rejected the preliminary objections of the SRA that it should not adjudicate on the facts of the matter as the scope of an appeal under Section 62 of the IBC only covers a “question of law.” The SC held that as material and relevant facts had been clearly ignored and legal principles had not been applied by the lower court, there arose a “question of law.”
- Fulfilment of conditions precedent: Both, the NCLT and NCLAT held that the SRA had substantially complied with all the CPs and, therefore, set the effective date of the Plan as May 20, 2022. However, the SC found that many of the CPs were such that they could not be fulfilled before the operationalization of Jet Airways, and therefore, the effective date could not kick-in merely on completion of the CPs. Notwithstanding this, the SRA had also failed in its obligation to implement the Plan, and this inaction on part of the SRA was indicative of its *mala fide* intention to not fulfill its obligations under the Plan.
- PBG adjusted against first tranche payment: As per the Plan, the first tranche payment of INR3,50,00,00,000 (Indian Rupees Three Hundred and Fifty Crores) had to be made by the SRA within one hundred and eighty (180) days from the effective date. Additionally, the PBG was required to be returned to the SRA only on completion of the Plan, as per Regulation 36B(4A) of the 2016 Regulations. Given this, the SC held that the IBC’s intention was to keep the PBG alive until completion and full implementation of the Plan. Therefore, there was no question of the PBG being allowed to be used against the payment of the balance first tranche payment under the Plan. Given this, the SC held that by not infusing the first tranche payment as per the Plan despite multiple extensions, the SRA had breached the Plan.
- Lender’s Affidavit: The SRA argued that the stipulation that the first tranche payment had to be infused in cash was only brought out in the Lender’s Affidavit, but that the Plan allowed for adjusting the PBG against the first tranche payment. The SC rejected this argument by providing that both, the Plan and the Lender’s Affidavit, reflected the same terms and no new terms had been introduced in the Lender’s Affidavit.
- Time of the essence: The SC cited the preamble of the IBC and multiple precedents set by it in the past to uphold that timely implementation of a resolution plan is one of the main objectives of the IBC. In a situation where a successful bidder is unable to revive

the corporate debtor after the passage of significant time, even liquidation may not yield any recovery for the lenders.

Our comments

In this case, the SC has reiterated the importance of speedy implementation of insolvency resolution plans. Further, the SC has given certain suggestions to expedite matters, i.e.,

- (i) the IBC provisions must be scrupulously followed by all key participants, including the NCLT, NCLAT, the corporate debtor, the resolution professionals, the committee of creditors, the potential and successful resolution applicants, the approved valuers and the liquidator;
- (ii) the committee of creditors should exercise its commercial wisdom and approve or reject the resolution plans placed before them exhibiting fairness and with good reasons; and
- (iii) the successful resolution applicants must have a determination to implement the plan fully and to rejuvenate the debtor company with appropriate support from the lenders and creditors in the process.

As India continues to vie for foreign investment, a key metric is the effectiveness of its dispute resolution mechanisms. In its current state, the IBC does not appear to have achieved the desired results either in terms of timely resolutions or substantial recovery for the lenders. Let us hope that all the stakeholders work in cohesion and follow the guidelines provided by the SC.